No. 80-1462

Office-Supreme Court,
FILED
MAR 31 1981
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IRIS M. MAITER, et al.,

Petitioners,

v.

CHICAGO BOARD OF EDUCATION, et al., and DISTRICT #21 PARENT EDUCATION COUNCIL, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED.

Does the requirement of Section 34-84 of The Illinois School Code (Illinois Revised Statutes, 1977, ch. 122, par. 34-84) that appointments and promotions of principals shall be made "for merit only" mandate that the Board of Education of the City of Chicago make appointments of persons in "rank order," as determined by the score assigned prospective principal candidates by the Board of Examiners?

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To: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Respondents respectfully submit that the judgment and opinion in this cause of the Supreme Court of the State of Illinois correctly stated the law as enunciated in prior decisions of that court and other Illinois courts. The judgment and opinion do not raise a federal question.

STATEMENT OF FACTS.

Petitioners' Statement of Facts is inaccurate and replete with argument. Respondents therefore deem it necessary to set forth this additional statement of facts.

Petitioners filed a complaint in the Circuit Court of Cook County, Illinois on June 12, 1975 seeking a declaratory judgment that the rules and procedures adopted by the Chicago Board of Education which established local school nominating committees to participate in the principal selection process were in violation of The School Code, the Fourteenth Amendment of the United States Constitution, and Section 2 of Article I of the Illinois Constitution. Petitioners contended that Section 34-84 of The School Code (Illinois Revised Statutes, 1977, ch. 122, par. 34-84), which provides that principals are to be appointed and promoted "for merit only," requires that appointments be made in "rank order" as determined by the score assigned prospective principal candidates by the Board of Examiners. On December 20, 1976, pursuant to petitioners' motion for summary judgment, the trial court entered its judgment order. The court found that rank-order appointment of principals was abhorrent because it precluded community input; however, the trial court ordered that all principals be selected by "rank order" until such time as the Board of Education adopted "a uniform system of community input." Following entry of the trial court's order, the Board of Education, on April 13, 1977, adopted uniform procedures and guidelines governing the participation of principal nominating committees.

Petitioners inaccurately state as fact that not all persons who apply for a principalship are interviewed, that each nominating committee has a different way in which it decides whom to nominate, and that there are no particular criteria for how votes are to be taken. The uniform guidelines and procedures adopted by the Board of Education pursuant to the trial court's order, *inter alia,* clarified the role of local nomi-

nating committees and changed and unified the procedures governing the interview and evaluation process. Petitioners inaccurately represent to this Court that local school nominating committees have continued to function under the rules and procedures in effect at the time this lawsuit was originally commenced almost six years ago. Similarly, belatedly and without support in the record, petitioners imply that local school nominating committees practiced or practice racial discrimination.

REASONS FOR DENYING THE WRIT.

I.

PETITIONERS' POSSESSION OF A PRINCIPAL'S CERTIFICATE DOES NOT CREATE A PROPERTY INTEREST.

This case fails to raise a federal question. The Illinois Supreme Court held herein (82 Ill. 2d 373 [1980]) that the requirement of Section 34-84 of The School Code that principals be appointed "for merit only" does not mandate that the Board of Education appoint persons to serve as principals solely according to the rank order of appearance on the eligibility list prepared by the Board of Examiners. Construing the relevant sections of The School Code *in pari materia* (Sections 34-8, 34-8.2, 34-18, 34-83 and 34-84), the Illinois Supreme Court found that the legislative scheme and the merit requirement of Section 34-84 of The School Code evince an intent that the Board of Education have great discretion in its statutory duty to appoint. The Court specifically stated that it need not decide whether or not the law, prior to the addition of Section 34-8.2, mandated rank order appointments. Notwithstanding that fact, petitioners continue to presume and tenaciously assert that such a rank order requirement had earlier existed. Having assumed the existence of a rank order requirement, petitioners next argue that "abolishment" of the alleged rank order requirement denied petitioners of a property interest without due process of law.

While the Fourteenth Amendment forbids the state to deprive a person of interests in life, liberty or property without due process of law, the protected interests are "not created" by that amendment but rather, "they are created and their dimensions are defined" by an independent source, such as state substantive statutes or rules or a substantive guarantee of another part of the U. S. Constitution. *Board of Regents* v. *Roth,* 408 U. S. 564, 577, 92 S. Ct. 2701 (1972). Due process rights support and protect categories of substantive rights emanating not from the due process clause but from other sources. This is the teaching of *Board of Regents* v. *Roth.* Where no substantive right to a benefit exists, due process is not implicated. The issue in this case is a substantive one, namely, whether possession of a principal's certificate and placement on an eligibility list create an absolute right of appointment to a position. The case of petitioners failed on the merits of that substantive issue; the complete failure of the purported substantive case destroys as well any claim of denial of due process of law.

A person who has passed the tests administered by the Board of Examiners and who possesses a principal's certificate and is on a principals' eligibility list, is eligible to be considered for appointment to a position as principal. It is within the sound discretion of the Board of Education whom to appoint to a given principalship vacancy. Possession of a principal's certificate and placement on an eligibility list merely make a person eligible for appointment as a Chicago School principal, but does not constitute a recognizable property interest under State law, and a person has no entitlement to such position prior to appointment. A property right in public employment only attaches after the applicant secures the position sought. "A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to State law." *Bishop* v. *Wood,* 426 U. S. 341, 344; 96 S. Ct. 2074 (1976). See also, *Board of Regents* v.

Roth, 408 U. S. 564, 92 S. Ct. 2074 (1972); *Perry* v. *Sindermann,* 408 U. S. 593, 92 S. Ct. 2694 (1972). Illinois law does not recognize hopes and expectations of a promotion to a higher position as a property interest, nor does it recognize entitlement to a principalship (or to any other employment within the school system) prior to actual appointment. The discretionary power to appoint and promote teachers and principals rests solely with the Board of Education.

The Illinois School Code does not confer an absolute right to a position by virtue of possession of a principal's certificate, nor is appointment automatic upon the granting of a certificate. It has been specifically held that a school principal has no property interest in his position. *Danno* v. *Peterson,* 421 F. Supp. 950 (N. D. Ill. 1976). See also *Webster* v. *Redmond,* 599 F. 2d 793 (7th Cir., 1979) 444 U. S. 1039, 100 S. Ct. 712, *cert. den.* (1980). In *Webster,* the plaintiff possessed a valid principal's certificate and was even nominated by a local nominating committee to be principal of a school which had a principalship vacancy; however, the Board of Education declined to appoint Webster to a principalship. Webster alleged deprivation of his property interest in his certificate and he also alleged an automatic entitlement to a principalship by virtue of possession of a valid principal's certificate. The Court of Appeals for the Seventh Circuit had occasion to review the Illinois statutory scheme and concluded at page 14:

> "In order to resolve the questions before us we need not definitively decide what the phrase 'for merit only' means in the Illinois law. It is sufficient if we can state with certainty that, whatever its meaning, it does not create an entitlement to a principalship under Illinois law, and that we can do. There is no indication that the Board of Education is merely a formalistic 'rubber stamp' in the promotion process, which Webster's argument would require. Rather, there is every indication that, whatever the order it must consider them in the Board of Education as a separate entity is to have the final word and power of promotion or denial over those candidates who have been

certified to it by the Board of Examiners. The statute states that promotions shall be made by the Board, and by no other. That they are only to be made for merit and not for patronage reasons surely does not prevent the Board from exercising its judgment against the merits of a given applicant. There is thus no indication in Illinois law that possession of a certificate from the Board of Examiners means anything more than that one is to be placed on the eligibility list and considered at the appropriate time by the Board of Education. Claims of entitlement to promotion sufficient to evoke constitutional protection must be based on a surer footing.' *Webster* v. *Redmond,* 599 F. 2d 793 (7th Cir., 1979)."

CONCLUSION

On the basis of the above and foregoing reasons and authorities, it is respectfully requested that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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